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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 13109 Civil

REPUBLIC PICTURES CORPORATION,
Appellant,

vs.

FRANCIS KAPPLER,
Appellee

JURISDICTIONAL STATEMENT

Nature of the Case

This was an action brought by the plaintiff-appellee against Republic Pictures Corporation for overtime pay under an employment which terminated May 15, 1943.

The plaintiff commenced his action on September 8, 1944.

The defendant defended on the ground that plaintiff's action was barred by Chapter 267, Laws of the 50th General Assembly of Iowa which became effective March 23, 1943, and provided as follows:

> Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal Statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1,

1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943.

The foregoing statute is found in the official bound volume of the Laws of the 50th General Assembly of the State of Iowa, at pages 269, 270 and is designated as Senate File 43.

The trial court held the Iowa statute was void as violative of the Supremacy clause of the Constitution of the United States. Appended hereto, marked Exhibit "A" is a copy of the opinion of the trial court. Upon appeal to the United States Circuit Court of Appeals, Eighth Circuit the judgment of the trial court was affirmed (Sanborn, Judge dissenting). Appended hereto, marked Exhibit "B", is a copy of the majority opinion of the Circuit Court of Appeals holding the statute in question to be invalid because it violated the Constitution of the United States, and a copy of the dissenting opinion by Sanborn, Judge.

Jurisdictional Statute

The jurisdiction of the Supreme Court of the United States is based upon Article III of the Constitution of the United States and Title 28, U. S. C. A., Section 347 providing in part as follows:

> 347 (b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

The appellant shows that the date of the judgment or decree sought to be reviewed is October 29, 1945, and thereafter appellant filed a timely petition for rehearing and that rehearing thereof was denied by the Circuit Court of Appeals for the Eighth Circuit on November 26, 1945.

A. A. McLaughlin,
E. D. Perry,
Robt. J. Bannister,
E. B. Carpenter,
Paul Ahlers,
As Attorneys for Appellant,
Republic Pictures Corporation.

Authorities

A Case in Which a State Statute Has Been Held Invalid Under the Federal Constitution by the Circuit Court of Appeals, Lies Within the Direct Appellate Jurisdiction of the Supreme Court.

Section 240(b) Judicial Code, 28 U. S. C. A. 347.

Bradford Electric Light Co. Inc. v. *Clapper, Admrx.*, 1931, 284 U. S. 221, 52 S. Ct. 8.

EXHIBIT "A."

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISON

No. 338—Civil

FRANCIS KAPPLER, Plaintiff,

vs.

REPUBLIC PICTURES CORPORATION, Defendant

Memorandum Opinion With Findings of Fact and Conclusions of Law

Filed February 8, 1945

This action came on for hearing in open court at Des Moines, Iowa, on its merits on the 19th day of January, 1945. Evidence was introduced and the case submitted on written arguments. The action is to recover for overtime pay as provided by the Fair Labor Standards Act of 1938 (Title 29, Section 201 et seq., U. S. Code).

Plaintiff entered the employ of the defendant corporation in February 1941, being employed by Mr. Moran, branch manager of the Des Moines office, and continued in this employment until June 1943.

Defendant is a corporation engaged in the moving picture business with its principal place of business in New York City. It maintains a branch distributing agency in Des Moines, Iowa, and it has owned, possessed, marketed and shipped moving picture merchandise to points in the State of Iowa and to points outside of the State of Iowa. There are about 10 people employed at Des Moines, including the plaintiff, the salesmen and the district manager. After the films are shipped to Des Moines from New York and New Jersey they are sold to exhibitors by the salesmen within and without the State of Iowa.

The duty and employment of the plaintiff was what is known as a booker. It was his duty to book the pictures on the dates that the pictures would fit into the booking

situation in the local office and it was his duty to see that the films were kept in uniform order and see that they were booked in proper order so that the films reached the exhibitors in time for their theater use and that the films were returned on time or would be forwarded to other points as might be necessary, and to more or less establish a booking arrangement in the sequence in which the pictures are released and more or less assist in completing the contractual obligation of the exhibitor. He also had to see that the pictures were forwarded by the exhibitor to the next exhibitor or returned to Des Moines. He was not directly engaged in their transportation in the sense that he had personal physical contact with the goods but directed the transportation companies and other agencies in whose hands they might be to deliver them at a particular time to appointed places. This was done by telephone, telegraph and correspondence through the mails.

The question for determination is whether under this situation the plaintiff is engaged in interstate commerce or in the production of goods for interstate commerce to bring him within the provisions of the statute.

From the decisions on this question we know that the Act is not co-extensive with the limits of the power of Congress over commerce; further, that there is no dependable touchstone to determine whether employees are "engaged in commerce;" the problem is one of drawing lines. *Kirschbaum* v. *Walling*, 316 U. S. 517.

The lines are to be drawn after "an analysis of the various types of transactions and the particular course of the business • • •" *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

It is the work of the particular employee and not the business of the employer which controls. *McLeod* v. *Threlkeld*, 319 U. S. 491. And the burden of proof is on the employee to show that he personally is either engaged in commerce or his work is necessary for the production of goods for interstate commerce. *Schwarz* v. *Wilwer Grocer Co.*, 141 F. 2d 341; *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699. The evidence does not indicate that the plaintiff's duties were necessary to produce moving

picture or films and the plaintiff does not therefore come within the rule that his work was necessary for the production of goods for commerce. *Western Union Tel. Co.* v. *Lenroot*, —— U. S. —— (Jan. 8, 1945).

The question for determination therefore is narrowed to whether the plaintiff has shown by a fair preponderance of the evidence that he was engaged in interstate commerce. And he must show that a substantial portion of his activities related to goods moving in the channels of interstate commerce. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 562, 572.

"The test to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." *McLeod* v. *Threlkeld*, 319 U. S. 491, 497.

"And in that connection closeness depends upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce. • • • If a cessation of the services of the employee causes an interruption or interference with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof." *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636, 638.

While as stated above, there is no dependable touchstone to determine whether employees are engaged in commerce, the Supreme Court of the United States in the case of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, held that a rate clerk working for a transportation company was engaged in commerce within the meaning of the Act and I can see little difference between the duties of a rate clerk in that case and the duties of the plaintiff here as a booking agent who keeps track of the goods being transported in interstate commerce and directs their destination. See also *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, where one of petitioners sold and collected toll tickets.

Defendant seriously contends that as the goods were shipped to Iowa and were sold from the Iowa office they

had come to rest in Iowa and that the plaintiff has failed to prove that a substantial portion of his activities related to goods moving in the channels of interstate commerce. The evidence of the plaintiff was that from the Des Moines office the prints of the films were shipped generally to points in Iowa and other offices and accounts outside of the State. And there is no evidence as to the proportion of the films that were shipped from the Iowa office to points outside of the State.

The trouble with this contention is that it assumes that the films came to rest in Iowa. The defendant in this regard relies upon that class of cases where goods are purchased and shipped to a person in a state for resale and the shipment terminates before the resale is made. Walling v. Jacksonville Paper Co., 317 U. S. 564. The defendant overlooks however the fact that the shipments from New York and New Jersey to Iowa were made by the corporation to its branch office and were not completed transactions to a third person. The branch office at Des Moines was a distributing agent for the defendant and the contracts of sale to exhibitors must have been sales by the corporation.

Under this situation the goods did not come to rest in Iowa but the interstate character of the transportation continued until the goods were in the hands of the exhibitors and, even then, they only stopped temporarily, as the goods were licensed and not sold, and the transportation continued until after all of the exhibitors had used them when they were returned to Des Moines and probably back to New York City. In any event the goods did not come to rest from the time of the initial shipment from New York and New Jersey until after they were used by the exhibitors, so that all of the duties of the plaintiff insofar as they related to the prints of these films were in interstate commerce. Binderup v. Pathe Exchange, 263 U. S. 291, 309; DeLoach v. Crowley's Inc., 128 F. 2d 378, 379; Walling v. Jacksonville Paper Co., 317 U. S. 564, 568.

The defendant contends, also, that even if the plaintiff was engaged in interstate commerce that the defendant never consented to his working in excess of 40 hours a week but, on the contrary, plaintiff was advised that it was the

policy of the company that he was to be employed during office hours aggregating 40 hours a week and that the company would not recognize any claims for overtime. Following out this policy of the company and by direction of the superintendent a directive was issued to all of the employees in the branch office at Des Moines, which was initialed as being received and understood by such employees, including this plaintiff, which reads as follows:

"Sept. 22, 1941

From F. R. Moran
To All Employees.

Effective this date we will use a daily time record, and each of you have the responsibility of setting down the time of your arrival at the office in the morning, when you leave for your lunch period, when you return, and again when you leave in the evening.

The office hours, as you know, are from 8:30 a. m. to 4:45 p. m. with an hour for lunch on week days, and from 8:30 a. m. to 12:15 p. m. on Saturdays. It is also to be understood that there is to be no overtime unless the proper approval is secured from either Mr. Adair or myself.

I can not stress the importance of this record being kept up to date at all times too strongly, therefore, to assure me that each of you thoroughly understand the above instructions, kindly initial this letter, which will indicate to me your full and complete understanding.

F. R. Moran."

The evidence establishes that Mr. Moran knew of the overtime being worked by plaintiff and made no objection thereto but in fact cooperated with the plaintiff in his overtime work. Under this situation I am satisfied that this claim of avoidance cannot prevail. There are many cases determining that the parties can not by contract limit the scope and effect of the congressional enactment and I think the statement in the recent case of Katharine F. Lenroot v. Interstate Bakeries Corpn., — F. 2d. —, (8 C. C. A., decided Jan. 2, 1945), is sufficient on the point here raised. In that case it is said:

"• • • the mandate of the statute is directed to the employer and 'he may not escape it by delegating it to others.' The 'duty rests on the employer to enquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision and compel reliance on subordinates. He must then stand or fall with those whom he selects to act for him • • • the duty must be held personal, or we nullify the statute • • • '. 'The cases must be rare where prohibited work can be done within the plant and knowledge or the consequences of knowledge avoided.' "

While the court in this case was discussing the provision of the Act having to do with child labor violations by subordinates, it appears to be equally pertinent to the provisions of the statute under discussion here. It will also be noted that in the directive set out above permission for overtime could be granted by Mr. Moran, who was the very person who knew of the overtime work being done by the plaintiff.

The final major defense is that the action is barred by the statute of limitations of the State of Iowa. That statute reads as follows:

"Sec. 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943." Chap. 267, 50th G. A. Iowa, 1943.

It will be noted that this is a very peculiar statute as it is not a general statute of limitations but it directed only to the provisions of federal statutes. It has been established by decisions of the Supreme Court of the United States ever since the time of John Marshall that acts of the Congress of the United States are supreme within the sphere

of the delegated authority to the United States government. The legislature of the State of Iowa had no more right therefore to tack on this provision to the federal statutes than a city would have by ordinance to add a provision to acts of the state legislature. It is not a question of constitutionality, but it is an attempt on the part of the legislature of the State of Iowa to enter a field of legislation exclusively within the authority of the Congress of the United States. It is true that where there is no limitation of time in which a federal statute can be enforced the federal judiciary turns to the general statute of limitations of a state to determine the question of laches. But this rule and these decisions have nothing to do with the determination of the question of whether the legislature of the State of Iowa had a right or authority to add to federal statutes provisions with reference to limitations on the time when actions might be maintained thereon. Congress only has such right, power and authority and the State cannot regulate and determine the time when actions may be brought under federal statutes in the State of Iowa.

Plaintiff kept a daily record of the time employed in his duties and I can find no reason to challenge his statement of the number of hours of work that he performed.

The question of what constitutes and how to determine "the regular rate at which he is employed," has its difficulties. The statute does not provide that an employee is to be paid time and a half for each hour he works over 40 hours a week but time and a half of "the regular rate at which he is employed." So if a person is employed not for any particular hours but at a regular rate of pay for his weekly or hourly work the "regular rate" would be the total number of hours he worked in each week or month. Overnight Motor Co. v. Missel, 316 U. S. 572; Walling v. Belo Corpn., 316 U. S. 624. But if his "regular rate" is based upon an agreed 40 hours a week rate then he is entitled to straight time and a half for all overtime. United States v. Townsley, — U. S. — (decided Jan. 15, 1945.).

We have to determine therefore what was the "regular rate" of the plaintiff in this case. I have read and reread the transcript and I am satisfied with the following conclusions:

At the time plaintiff was first employed there was nothing said about the number of hours that he was to work for his weekly wage of $35. However, on account of the extra hours that he was working he took the matter up with the manager as to what should be done about payment for overtime and the manager in turn took the question up with the home office in New York City. Mr. Moran sometime in June or July, 1941, was then advised by the New York office—"that they wanted overtime kept at a minimum and, if necessary, hire additional people to do the work." Mr. Moran, following out what he considered were the directions from the home office, then prepared and served upon each employee in the Des Moines office the written directive dated Sept. 22, 1941, which is set out in full above.

From the evidence, therefore, I conclude that from and after Sept. 22, 1941, the defendant determined and put in force a policy that the weekly wage of the employees was to be for a 40-hour week only. In figuring the amount of the plaintiff's overtime therefore, his regular rate must be determined on the full amount of the hours that he worked prior to Sept. 22, 1941, and at a rate based on 40 hours a week after that time.

I therefore make the following findings of fact and conclusions of law.

Findings of Fact

1st. I find that the plaintiff was an employee of the defendant from February 1941 to June 1943.

2nd. That the original contract of employment did not specify and there was no agreement as to the number of hours which plaintiff was to work in any one week, but on Sept. 22, 1941, the defendant notified all its employees at Des Moines that from and after that date their employment was for a 40-hour week.

3d. That the defendant was during the time of such employment engaged in the moving picture business and owned, possessed, marketed and shipped moving picture films from New York and New Jersey to points in the State of Iowa and to points outside of the State of Iowa.

4th. That plaintiff's employment during this period, and substantially for all of his time, was as a booker of these

films after they had been sold to exhibitors within the area of the Des Moines branch, and his activities were so closely related to the interstate transportation of these goods as to be a part thereof.

5th. That the intervener, Erma Jean Schultz, did not appear and introduced no evidence and her intervention should be dismissed for want of prosecution with prejudice.

Conclusions of Law

1. That the petition of intervention of Erma Jean Schultz should be and the same is hereby dismissed with prejudice for want of prosecution.

2. That plaintiff was during the time of his employment engaged in interstate commerce and that the principal part of his activities was in such employment.

3. That all of the goods and films shipped from New York and New Jersey into the State of Iowa continued in the stream of interstate commerce while they were in the State and during the time that plaintiff's activities had to do with and were a part of such shipments.

4. That the plaintiff, Francis Kappler, is entitled to overtime pay from February 1941 to Sept. 22, 1941, to be computed according to the method set out in Missel v. Overnight Motor Trans. Co., 126 F. 2d 98, at 110. Overnight Motor Co. v. Missel, 316 U. S. 572. Walling v. Belo Corp., 316 U. S. 624.

5. That the plaintiff, Francis Kappler, is entitled to overtime compensation at the rate of straight time and one-half for the hours which he worked over and above 40 hours a week from Sept. 22, 1941, to June 1943. See United States v. Townsley, — U. S. — (decided Jan. 15, 1945).

6. That plaintiff is also entitled to liquidated damages as provided by statute. Sec. 216 (b), Title 29, U. S. C.

7. That plaintiff is entitled to the relief demanded as determined above, with judgment against the defendant for costs and an attorney's fee in the sum of $300.

8. That the statute relied upon by the defendant of the State of Iowa as a statute of limitations is ineffective as being an attempt by the State legislature to invoke powers belonging exclusively to the Congress of the United States.

9. That the policy of the defendant to employ the plaintiff for specific hours at a specific weekly wage with directions to its employees not to work overtime, even though known to the plaintiff, did not affect the right of the plaintiff to rely upon the Fair Labor Standards Act to recover for overtime.

10. The attorneys for plaintiff may prepare a judgment entry in conformity with the foregoing findings of fact and conclusions of law.

11. Defendant's motion made at the close of all the evidence to dismiss is overruled.

To each and every finding of fact and conclusion of law the defendant and plaintiff except.

Signed at Des Moines, Iowa, this 8th day of February, 1945.

Sgd. CHAS A. DEWEY,
United States District Judge.

EXHIBIT "B"

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 13,109

REPUBLIC PICTURES CORPORATION, *Appellant,*

vs.

FRANCIS KAPPLER, *Appellee*

Appeal from the District Court of the United States for the Southern District of Iowa

(October 29, 1945)

Mr. Paul Ahlers (Mr. E. D. Perry, Mr. Robert J. Bannister and Mr. E. B. Carpenter were with him on the brief) for Appellant.

Mr. Walter F. Maley (Mr. Ted E. Hartung was with him on the brief) for Appellee.

Before Gardner, Sanborn and Thomas, Circuit Judges

GARDNER, *Circuit Judge*, delivered the opinion of the Court.

This was an action brought by appellee as plaintiff to recover for overtime pay, under the provisions of the Fair Labor Standards Act of 1938 (Title 29, U. S. C. A., Sec. 201 et seq.), for a period of time between February, 1941, and June, 1943. He was employed by the manager of the Iowa state branch of Republic Pictures Corporation, at its Des Moines office. At all times here material defendant was engaged in the moving picture business, with its principal place of business in New York City. It maintained a branch distributing agency at Des Moines, Iowa, and it owned, handled, possessed, marketed and shipped moving picture films to points both in the State of Iowa, and to points outside of that state. After the films were shipped from either New York or New Jersey to Des Moines, Iowa, they were leased or sold to exhibitors within and without the State of Iowa. Defendant employed about ten people, including plaintiff, at its branch office in Des Moines. Plaintiff was known as a booker, and it was his duty to book the films shipped from New York and New Jersey on the dates the pictures would fit into the booking situation, and it was his duty to see that the films were kept in uniform order, and to see that they were booked in proper order so that the films reached the exhibitors in time for their theater use and to see that the films were returned on time so as to be forwarded to other points designated by him, and to establish a booking arrangement fixing the sequence in which pictures were released, and to assist in handling and keeping the contractual obligations of the exhibitor with defendant. He also had to see that the films were forwarded by the exhibitor to the next nearest exhibitor leasing or renting the films, or arrange for their return to the branch office at Des Moines. He directed the transportation companies and other agencies to whom the films might be delivered for transportation to the points designated. This directing work was done largely by telephone, telegraph, and through the

mails. The trial court concluded as a matter of law, "That plaintiff was during the time of his employment engaged in interstate commerce and that the principal part of his activities was in such employment."

As an affirmative defense defendant pleaded a special statute of limitations limiting time for commencing actions on claims arising pursuant to any federal statute to a period of six months after the accrual of such claim. The action was commenced in September, 1944, more than six months after its accrual, but the trial court held the state statute of limitations ineffectual as being an attempt by the state to invoke power belonging exclusively to the federal government.

On this appeal defendant contends, as it contended in the trial court, that (1) plaintiff was not engaged in commerce; (2) the Iowa statute of limitations bars recovery.

Defendant admits that it is engaged in interstate commerce, but it denies that the evidence shows that plaintiff was so engaged. It admits too that plaintiff's activities are necessary to its interstate commerce.

Section 6 of the Fair Labor Standards Act of 1938 (Title 29 U. S. C. A., Sec. 206), provides for the payment of minimum wages to employees "engaged in commerce or in the production of goods for commerce." Section 3 of the Act (Title 29 U. S. C. A., Sec. 203), defines commerce as follows:

> " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

The same section of the Act provides that for the purposes of the Act "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Plaintiff does not contend that he was engaged in the actual production of goods for commerce. As has been

observed, he kept records which were essential to the movements of the goods of the employer in commerce. It must be conceded that the test as to whether an employee is engaged in commerce is somewhat more exacting than the test as to whether his occupation is necessary to production for commerce. *Armour & Company* v. *Wantock*, 323 U. S. 126. The words, however, should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation. *Overstreet v. North Shore Corp.*, 318 U. S. 123. The practical test to be applied is whether, without the particular service, interstate commerce would be impeded or abated. *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572; *Overstreet v. North Shore Corp., supra.* Great remoteness, however, renders the act inapplicable. *McLeod* v. *Threlkeld*, 319 U. S. 491. Such cases as *Fox Film Corp.* v. *Trumbull, D. C. Conn.*, 7 F. 2d 715, involving the power of a state to regulate or tax the exhibition of moving picture films brought into the state through interstate commerce have, we think, no bearing here on the question of the meaning of a federal statute passed by Congress in the exercise of its control over interstate commerce. As said by the Supreme Court in *Binderup* v. *Pathe Exchange*, 263 U. S. 291,

> "It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause."

In adopting the Fair Labor Standards Act of 1938, Congress clearly indicated its purpose to leave local business to the protection and regulation of the state, but a mere temporary break in the interstate transportation of goods by placing them in a warehouse awaiting final delivery, or, as in the instant case, a series of deliveries and transmission to and from the place of temporary rest, does not remove the goods from commerce within the meaning of the Act. *Walling, etc.* v. *Jacksonville Paper Co.*, 317 U. S. 564. As said in the last cited case,

> "• • • if the halt in the movement of the goods is a convenient intermediate step in the process of

> getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended."

Defendant was not shipping the films to Des Moines to be stored nor for final delivery, but its business depended upon these films being kept in circulation. Plaintiff was an active factor in keeping the films in such circulation and use. We think it clear that the transportation of the films and their use must be viewed as a continuity, embracing shipments from New York and New Jersey to Des Moines, Iowa, and the shipment of them to and from Des Moines to other parts of Iowa and other states. Plaintiff's contact with and participation in interstate commerce were substantial. His services were essential to the movement of commerce and hence, he was engaged in commerce within the meaning of the Act. *United States* v. *Darby*, 312 U. S. 100; *Schmidt* v. *Peoples Telephone Union*, 8 Cir., 138 F. 2d 13.

Was plaintiff's action barred by the Iowa special statute of limitations? The statute relied upon is embodied in Section 1, Chapter 267, Acts of the 50th General Assembly, which became effective March 23, 1943. This section reads as follows:

> "Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any federal statute wherein no period of limitation is prescribed, the holders of such claim or cause of action may commence action therein within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943."

The Fair Labor Standards Act contains no provision limiting the time for commencing actions thereunder. Ordinarily, in the absence of legislation by Congress, the courts of the United States apply the statute of limitations

of the state in law actions. The state statutes of limitations are considered as rules of decision and binding on federal courts. Thus, in the absence of a provision in the federal statute prescribing a limitation, the statute of the particular state in which the action may be brought is applicable to an action to enforce a liability under a particular statute. *Payne* v. *Ostrus*, 8 Cir., 50 F. 2d 1039; *Chicago & N. W. Ry. Co.* v. *Ziebarth*, 8 Cir., 245 F. 334; *Harrison* v. *Remington Paper Co.*, 8 Cir., 140 F. 385; *Rawlings, Receiver* v. *Ray*, 312 U. S. 96; *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154.

Section 725, Title 28, U. S. C. A. provides that,

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

By virtue of this statute a state statute of limitations was held controlling in the above cited cases. The adjudicated cases which apply the state statute of limitations in a federal court action are those in which a general statute of the state has been held to be applicable to the particular cause of action, the language of which was so general that all similar cases were included. In the instant case, the statute applies only to those claims or causes of action created or growing out of federal statutes. It arbitrarily singles out all actions involving the assertion of rights created by or flowing from an act of Congress. The general Iowa statute of limitations (C. 487, Code 1939), prescribing the time within which actions may be brought contains nine separate classes of actions. The classifications referring to contracts fix the limitations as follows: on written contracts, ten years; on contracts not in writing and accounts, five years.

A state may not discriminate against rights accruing under federal laws. *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230; *Pufahl* v. *Estate of Parks*, 299 U. S. 217. Except the special statute directed at the causes of action arising under federal law, every other limitation on an action

at law or suit in equity in the Iowa statutes is directed at the nature of the claim asserted without reference to the authority which creates the right asserted. This is a discrimination against the United States. The action for overtime under the statute is an action on contract; at least, the federal statute is bottomed upon a contract of employment. As said in *Northwestern Yeast Co.* v. *Broutin*, 6 Cir., 133 F. 2d 628,

> "The federal statute is premised upon the existence of an employment contract * * *. * * * The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

Were it not for the fact that plaintiff's right can be traced to a federal statute he could have brought his action in five years after its accrual if his contract were not written or he could have brought it in ten years if it were written. His claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment of a claim arising under a federal statute in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme. As said by the Supreme Court in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94,

> "Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

While the sphere of sovereignty of the federal government is a limited one, yet its power over the subjects committed to it is full and complete and its laws are "The Supreme law of the land * * * anything in the constitution or laws of any state to the contrary notwithstanding." (Art. 6, U. S. Constitution). As a federal right is here involved, the state can not justify a discrimination against such right. *Miles* v. *Illinois Central RR. Co.*, 315 U. S. 698.

In *Pufahl* v. *Estate of Parks, supra*, an action was brought in a state court by the receiver of a national bank to recover stockholders' liability under a federal statute. Hold-

ing that the receiver was governed by the law of the forum with respect to the marshaling of assets, priority of distribution, etc., the court said,

> "This is not to say that a state may deny all remedy for the substantive right arising out of the federal statute * * *; it is merely to say that *if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action." (Italics supplied).

See, also, *Campbell* v. *Haverhill*, 155 U. S. 610.

Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitation for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violates Article 6 of the Constitution in that "it discriminates against rights arising under federal laws." *McKnett* v. *St. Louis & S. F. Ry. Co., supra.* Its enforcement would result in denying to those seeking to assert such claims, the equal protection of the law. (14th Amendment, Constitution, Sec. 1). Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination.

We conclude that this special statute of limitations can not be enforced in federal Court. The judgment appealed from is therefore affirmed.

Plaintiff asks for the allowance of attorney fees on this appeal. The trial court allowed him $300.00 as compensation for his attorneys in the trial court. An attorney fee of $250.00 on this appeal is hereby allowed.

SANBORN, *Circuit Judge*, dissenting:

In my opinion, there is no adequate basis for ruling that the Iowa statute of limitations in suit is unconstitutional. In enacting the Fair Labor Standards Act, Congress saw

fit to omit a provision limiting the time within which rights created by the Act might be asserted. Congress could, no doubt, have required that claims based upon the statute should be barred after six months from the time of their accrual. Since the Act fails to prescribe any period of limitations, each state, I think, is at liberty to fix the time within which actions to enforce rights granted by the Act shall be commenced.

This is clearly an action to enforce a right created by a federal statute which prescribes no period of limitation, and the action, therefore, comes within the purview of the Iowa statute of limitations in suit. Compare, *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

A statute of limitations does not take away any right of action, but merely limits the time within which the right may be asserted. *Turner* v. *New York*, 168 U. S. 90, 94; *Mattson v. Department of Labor*, 293 U. S. 151, 155. In other words, such a statute does not impair any substantive right, but affects only the time within which the remedy to enforce it shall be available. "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection." *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 562. See and compare, *Terry v. Anderson*, 95 U. S. 628, 633; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 77; *Mills v. Scott*, 99 U. S. 25, 27; *Vance* v. *Vance*, 108 U. S. 514, 520-521; *Turner v. New York*, *supra*, page 94 of 168 U. S.; *Wilson v. Iseminger*, 185 U. S. 55, 62-63; *United States v. Morena*, 245 U. S. 392, 397; *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 258 U. S. 190, 196-197; 34 Am. Jur., pages 27-33.

The plaintiff had no vested interest in a particular limitation, and the legislature of Iowa could prescribe a limitation where none existed before or could change one already established, "provided adequate means of enforcing the right remain." *Terry v. Anderson, supra*, page 633 of 95 U. S.

I have found no case involving the question of the validity of a statute of limitations, in which the Supreme Court of the United States has concerned itself with the propriety or fairness of the basis adopted by a state legislature for classifying causes of action. Statutes of limitation are, in their nature, necessarily somewhat arbitrary and discriminatory. There seems to be no provision in the Federal Constitution which prohibits a State from providing a special period of limitation for a cause of action of a certain kind or for a designated class of actions, so long as the time allowed is sufficient to permit enforcement of substantive rights. I think that the time allowed by the statute of limitations in suit cannot, as a matter of law, be said to be so short as to invalidate the statute. Compare, *Turner v. New York, supra,* page 94 of 168 U. S., and *Mills v. Scott, supra,* page 27 of 99 U. S.

In *Eggen v. Canadian Northern Ry. Co.,* 8 Cir., 255 F. 937, this Court, with one judge dissenting, held that a statute of limitations of the State of Minnesota was discriminatory and therefore unconstitutional. In doing so, it relied upon general language found in cases which did not involve the precise questions. Judge Hook, who dissented, referred to this in his dissenting opinion in that case page 940 of 255 F.). The Supreme Court reversed this Court, in 252 U. S. 553. While the Eggen case did not raise the same question of discrimination which is presented here, that case discloses the hazards involved in ruling that state statutes of limitation are unconstitutional on the ground that they are discriminatory.

Since I can find no sufficient justification for ruling that the Iowa statute of limitations in suit is violative of the Constitution of the United States, I respectfully dissent from so much of the majority opinion as holds to the contrary.

A true copy. Attest:

Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

FILE COPY

No. 723

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

REPUBLIC PICTURES CORPORATION, *Appellant*,

vs.

FRANCIS KAPPLER, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
8th CIRCUIT.

BRIEF OF APPELLANT IN RESISTANCE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

E. D. PERRY,
ROBT. J. BANNISTER,
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IN THE

Supreme Court of the United States

REPUBLIC PICTURES CORPORATION, *Appellant,*

vs.

FRANCIS KAPPLER, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF APPEALS
8th CIRCUIT.

BRIEF OF APPELLANT IN RESISTANCE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

On October 29, 1945 the Circuit Court of Appeals, 8th Circuit, affirmed a judgment of the Federal District Court, Southern District of Iowa, Central Division, allowing a claim of the plaintiff-appellee for overtime pay under the Fair Labor Standards Act of 1938.

The appellant, Republic Pictures Corporation, defendant in the trial court, had pleaded in defense to the claim of the plaintiff, that the same was barred by Chapter 267, Section 1, Laws of the 50th General Assembly of Iowa, which took effect March 23, 1943 and provided as follows:

> "Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months

after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943."

On November 26, 1945 petition for rehearing was denied by the Circuit Court of Appeals.

On December 3, 1945 Notice of Appeal to the Supreme Court of the United States was duly served upon the appellee and service was acknowledged by his attorneys of record, Walter F. Maley and Ted E. Hartung.

Notwithstanding the notice was served in compliance with the Act of January 31, 1928, designated as Chapter 14, 45 Stat. 54 (set out on page 10 of the Appendix to the printed Rules of the Supreme Court) through an abundance of caution, the appellant on December 4, 1945 also filed a Petition for Allowance of Appeal, Jurisdictional Statement and Assignment of Error and on the same day an order was duly entered by Hon. Kimbrough Stone of the Circuit Court of Appeals, allowing the appeal and fixing the amount of supersedeas bond at $4500.00; on December 5, 1945 the order allowing the appeal and supersedeas bond were duly filed.

On December 8, 1945 the appellee was duly served with copies of the petition for an order allowing appeal, together with a copy of the assignment of error and copy of an additional assignment of error which had not then been filed, also a copy of the jurisdictional statement and a notice directing the attention of the appellee to Paragraph 3 of Rule 12 of the Rules of the Supreme Court.

On December 11, 1945 an affidavit of service of the foregoing papers on December 8, 1945 was filed.

The first assignment of error filed by appellant related to the constitutional question involved, and the second assignment of error related to the federal question of whether the evidence showed the appellee to have been "engaged in commerce" or "engaged in production of goods for commerce" under the Fair Labor Standards Act of 1938.

Chapter 267, Laws of the 50th General Assembly of Iowa, the constitutionality of which is involved in this appeal took effect March 23, 1943. Appellee's employment by Appellant terminated on May 20, 1943. The present action was commenced in the trial court on September 8, 1944. Following the decision by the trial court on February 8, 1945 holding the statute in question to be invalid, the legislature of the State of Iowa repealed Chapter 267 by Chapter 222, Laws of the 51st General Assembly, the repeal taking effect on July 4, 1945.

BRIEF POINTS.

THE APPEAL WAS DULY TAKEN BY VIRTUE OF THE NOTICE OF APPEAL SERVED ON THE APPELLEE ON DECEMBER 3, 1945.

Act of Jan. 31, 1928, Ch. 14, 45 Stat. 54.

Section 240(b) Judicial Code, 28 USCA Sec. 347.

A CASE IN WHICH A STATE STATUTE HAS BEEN HELD INVALID UNDER THE FEDERAL CONSTITUTION BY THE CIRCUIT COURT OF APPEALS, IS WITHIN THE DIRECT APPELLATE JURISDICTION OF THE SUPREME COURT.

Secton 240(b) Judicial Code, 28 USCA Sec. 347.

Bradford Electric Light Co. Inc. v. Clapper, Admrx., 1931, 284 U. S. 221, 52 S. Ct. 8.

IN A CASE WHERE THE APPELLATE JURISDICTION OF THE SUPREME COURT IS INVOKED BY REASON OF A DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING A STATE STATUTE INVALID UNDER THE FEDERAL CONSTITUTION, AND A NOTICE OF APPEAL IS SERVED UNDER THE ACT OF JANUARY 31, 1928 (CHAPTER 14, 45 Stat. 54) NEITHER A PETITION TO ALLOW APPEAL OR ORDER ALLOWING THE APPEAL

IS NECESSARY; THEREFORE ALTHOUGH THE FILING OF AN ASSIGNMENT OF ERRORS MAY BE NECESSARY, UNDER THE GENERAL RULE, IT NEED NOT BE FILED WITH A PETITION FOR ALLOWANCE OF APPEAL, THE APPEAL ALREADY HAVING BEEN DULY TAKEN UNDER THE ACT OF JANUARY 31, 1928.

Act of January 31, 1928, Ch. 14, 45 Stat. 54.

THE MATTER CONTAINED IN THE ADDITIONAL ASSIGNMENT OF ERROR FILED BY APPELLANT INVOLVES A FEDERAL QUESTION PRESENTED IN THE CASE. IT IS THEREFORE REVIEWABLE ON THE APPEAL FROM THE DECISION HOLDING THE IOWA STATUTE INVALID AS IN VIOLATION OF THE FEDERAL CONSTITUTION.

Judicial Code, Sec. 240(b); 28 USCA Sec. 347(b).

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS BASED SQUARELY UPON THE PROPOSITION THAT THE IOWA STATUTE IN QUESTION WAS VOID BECAUSE IT VIOLATED THE FEDERAL CONSTITUTION.

Opinion of Circuit Court of Appeals and dissent by Sanborn, J.

REPEAL OF THE IOWA STATUTE AFTER THE APPELLEE'S CAUSE OF ACTION WAS BARRED BY IT, CANNOT BE CONSTRUED SO AS TO AFFECT THE APPELLEE'S CAUSE OF ACTION WHICH WAS ONCE BARRED. THEREFORE, THE QUESTION PRESENTED BY THIS APPEAL IS NOT MOOT.

Sec. 63(1) Code of Iowa, 1939.

Thompson v. Read, 1875, 41 Iowa 48.

STATE DECISIONS CONSTRUING STATE STATUTES OF LIMITATION, ARE BINDING UPON THE FEDERAL COURTS, AND SUCH STATE STATUTES MUST BE AP-

PLIED IN THE MANNER IN WHICH THEY HAVE BEEN CONSTRUED BY THE HIGHEST COURT OF THE STATE.

28 USCA Sec. 725.

Bell v. Morrison, 1 Pet. (26 U. S.) 351.

Van Dyke v. Parker, 1936, (CCA 9th Cir.), 83 F(2d) 35.

Young v. Alexander, 1928, 29 F(2d) 555.

Pickett v. Aglinsky, 1940, (CCA 4th Cir.), 110 F(2d) 628.

IN IOWA, REPEAL OF A STATUTE OF LIMITATIONS DOES NOT APPLY TO CAUSES OF ACTION WHICH WERE BARRED BY THE STATUTE AT THE TIME OF REPEAL. THIS IS A STATUTORY RULE OF CONSTRUCTION APPLIED TO REPEALING STATUTES.

Sec. 63(1) Code of Iowa, 1939.

Thompson v. Read, 1875, 41 Iowa 48.

ARGUMENT.

In his motion to dismiss or affirm the appellee raises three points, which are:

1. That the court is without jurisdiction to entertain appellant's second assignment of error for the following reasons:

(a) It was not presented to and considered by the Eighth Circuit Court of Appeals at the time order allowing appeal was entered.

(b) Assignment of Error No. 2 presents only alleged error based upon a finding of fact by both the United States District Court of Iowa and the Eighth Circuit Court of Appeals.

(c) There is a misjoinder in errors assigned, one at law under assignment of Error No. 1 and one of fact under assignment of Error No. 2.

(d) The Supreme Court of the United States is without jurisdiction to review, consider or determine assign-

ment of Error No. 2 for the reason that the only possible right to prosecute an appeal is derived from Section 240 (b) of the Judicial Code, 28, U. S. C. A., Section 347 (b) which limits the Supreme Court upon appeal to the consideration of questions of law, only, and assignment of Error No. 2 would require the review of questions of fact, as distinguished from the question of law.

2. That the repeal of Chapter 267, Section 1, Laws of 50th General Assembly of Iowa on July 4, 1945 rendered moot the question of the statute of limitations involved in this case.

3. That the decision of the Circuit Court of Appeals, 8th Circuit, in the case at bar did not hold the statute of limitations invalid on the ground of its being repugnant to the Constitution of the United States.

Regarding the last of the above propositions, appellant respectfully submits that the decision of the Circuit Court of Appeals was placed squarely on the ground that the statute in question was invalid because it was repugnant to the Constitution of the United States. The following quotation taken from the majority opinion in the Circuit Court of Appeals should be conclusive upon the foregoing point:

"Were it not for the fact that plaintiff's right can be traced to a federal statute he could have brought his action in five years after its accrual if his contract were not written or he could have brought it in ten years if it were written. His claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment of a claim arising under a federal statute in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme. As said by the Supreme Court in *Stewart & Co. v. Sadrakula*, 309 U. S. 94,

" 'Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.'

"While the sphere of sovereignty of the federal government is a limited one, yet its power over the subjects committed to it is full and complete and its laws are 'The supreme law of the land * * * anything in the constitution or laws of any state to the contrary notwithstanding.' (Art. 6, U. S. Constitution). As a federal right is here involved, the state cannot justify a discrimination against such right. *Miles v. Illinois Central RR. Co.*, 315 U. S. 698.

"In *Pufahl v. Estate of Parks*, supra, an action was brought in a state court by the receiver of a national bank to recover stockholders' liability under a federal statute. Holding that the receiver was governed by the law of the forum with respect to the marshaling of assets, priority of distribution, etc., the court said,

" 'This is not to say that a state may deny all remedy for the substantive right arising out of the federal statute * * *; it is merely to say that *if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action.' (Italics supplied).

"See, also, *Campbell v. Haverhill*, 155 U. S. 610.

"Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitation for the bringing of such action than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violates Article 6 of the Constitution in that 'it discriminates against rights arising under federal laws.' *McKnett v. St. Louis & S. F. Ry. Co., supra.* Its enforcement would result in denying to those seeking to assert such claims, the equal protection of the law. (14th Amendment, Constitution, Sec. 1). Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination.

"We conclude that this special statute of limitations can not be enforced in federal court. The judgment appealed from is therefore affirmed."

The first sentence in the dissenting opinion of Sanborn, Circuit Judge, is as follows:

"In my opinion, there is no adequate basis for ruling that the Iowa statute of limitations in suit is unconstitutional".

It is therefore apparent that the decision of the Circuit Court of Appeals holds the statute invalid upon two grounds, as follows:

1. That it violates the Supremacy Clause (Article 6 of the Constitution of the United States), and

2. That it denies the equal protection of the law to litigants (Constitution of the United States, Fourteenth Amendment, Section 1).

Further argument on the foregoing point would be superfluous. The issue throughout this litigation has been one of constitutionality of the statute in question.

Regarding the second of the appellee's contentions, viz.: That the issue of the statute of limitations has become moot by virtue of the repeal of the statute of limitations in question by the legislature of Iowa, effective July 4, 1945, it is only necessary to point out that repeal of the statute in question was subsequent to the decision in the trial court holding the statute invalid and that the action of the plaintiff-appellee was fully barred at the time of repeal. Plaintiff-appellee's employment by the appellant terminated May 20, 1943 and the present action was not commenced until September 8, 1944. Therefore, if the statute in question be valid, appellant has a perfect defense to the claim of the plaintiff. In the consideration of this matter it is important to note that the question of the *power* of the legislature to repeal a statute of limitations and have the repealing statute operate retroactively so as to revive causes of action already barred, is not involved, for the statutes of Iowa provide that the repeal of such a statute shall not be construed as applicable to causes of action already barr-

ed. Thus, Section 63, Code of Iowa 1939, provides in part as follows:

"Rules. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"1. Repeal—effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

The Supreme Court of Iowa has held this statute to mean that a repealing statute shall not be construed so as to apply to a cause of action which has once been fully barred. Thus, in *Thompson v. Read* (1875) 41 Iowa 48, the court says:

"A repeal or an amendment of the law could not change the condition of the parties already fixed by the law. The repeal of a statute of limitation, and of course an amendment thereof, cannot act retrospectively so as to disturb rights acquired thereunder and deprive parties of protection to which they were fully entitled under the prior enactments. Actions barred under the statute are not revived upon its repeal. *Norris v. Slaughter*, 19 Green 338 (346); *Specker v. Wakeley*, 11 Wis., 432; *McKinney v. Springer*, 8 Blackf., 506; *Stepp v. Brown*, 2 Ind. 647; *Davis v. Monroe*, 1 How., Miss., 183; *Wiers & Peck v. Farr*, 25 Vt., 41; *Shelley v. Gray*, 11 Wheat, 361; *Woast v. Warnecke*, 3 N. H., 478.

"In this State the repeal of a statute cannot affect any right which has accrued or has been established. Rev., Sec. 29, Code, Secs. 45, 50. It would appear that this provision protects a party from liability upon a cause of action fully barred under the statute of this State by the repeal of such statute or by an amendment operating to restrict its application."

Concerning the rule that the decisions of the highest court of a state are controlling on a question of construction of its own statutes see:

28 USCA Sec. 725.

Bell v. Morrison, 1 Pet. (26 U. S.) 351.

Van Dyke v. Parker, 1936, (CCA 9th Cir.), 83 F(2d) 35.

Young v. Alexander, 1928, 29 F(2d) 555.

Pickett v. Aglinsky, 1940, (CCA 4th Cir.), 110 F(2d) 628.

Regarding the first contention made by the appellee, viz.: That this appeal was improperly taken with reference to the second assignment of errors by the appellant, the appellee appears to have overlooked entirely the act of Congress of January 31, 1928 (Chapter 14, 45 Stat. 54) which provides: "That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Because the decision of the Circuit Court of Appeals held a state statute void under the federal constitution, there can be no question but that this appeal could be taken as a matter of right (Section 240(b) Judicial Code, 28 USCA, Section 347).

Appellant admits that the second assignment of errors was not filed at the time the order allowing the appeal was filed. But the appeal had already been properly taken by

service of the notice of appeal (Act of January 31, 1928, Chapter 14, 45 Stat. 54) and under the provisions of the cited section neither a petition for appeal nor order allowing appeal was required.

The only requirement that the assignment of errors be filed at a particular time is to be found in Rule 9 of the Rules of Supreme Court, which requires the assignment of errors to be filed with the petition for allowance of the appeal.

Appellant respectfully submits that under the Act of January 31, 1928, neither a petition for appeal or allowance of appeal is necessary and therefore the second assignment of errors by the appellant was timely. However, if appellant is in error in the foregoing assumption the appeal is nevertheless properly taken with reference to the first assignment of error involving the constitutional issue and which accompanied the petition to appeal.

Appellee further complains that the second assignment of error calls for

(a) Review of a finding of fact,

(b) Involves a misjoinder of errors assigned, and

(c) That the court is limited to a review of questions of law only.

But appellee overlooks the fact that appellant is not requesting the Supreme Court to make a new finding of facts. Appellant challenges the sufficiency of the evidence *as a matter of law* to sustain a conclusion by the trial court that appellee was "engaged in commerce" and therefore within the coverage of the Fair Labor Standards Act of 1938. Appellant asks for no finding of fact by the Supreme Court. Instead, appellant presents the federal question of interpretation of the phrase "engaged in commerce" as used in the Fair Labor Standards Act. Section 240 of the judicial code, 28 USCA Section 347(b) provides that the review on appeal "shall be restricted to an examination and decision of the

Federal questions presented in the case." Appellant asks for no fact finding on this appeal. It submits that if the evidence be taken as a verity, there is no showing that the appellee was "engaged in commerce" as a matter of law.

In closing, appellant directs the attention of the court to the importance of the constitutional question here involved. Within the last two years, at least fourteen other states have adopted statutes of limitation specifically applicable to some type of federally created rights, to-wit:

Alabama	Act 392,	Acts 1943
Colorado	S. B. 165	Laws 1945
Florida	Ch. 21892	Laws 1943
Georgia	Act 439	Laws 1943
Maryland	Ch. 518	Laws 1945
Minnesota	Ch. 513	Laws 1945
North Carolina	S. B. 316	Laws 1945
North Dakota	H. B. 114	Laws 1945
Ohio	S. B. 256	Laws 1943
Oregon	Ch. 265	Laws 1943
South Carolina	Act 346	Acts 1945
South Dakota	Ch. 145	Laws 1945
Tennessee	Ch. 130	Acts 1945 and
Wisconsin	Sec. 330, 215	Statutes 1945

It is therefore important that the matter be considered and settled by an early decision of this court.

Appellant respectfully submits that the motion filed by the appellee is without merit and prays that it be denied in whole and in part.

Respectfully submitted,

E. D. Perry,

Robt. J. Bannister,

E. B. Carpenter,

Paul Ahlers,

Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 723

REPUBLIC PICTURES CORPORATION,
Appellant,

vs.

FRANCIS KAPPLER

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

GEORGE B. PORTER,
WALTER F. MALEY,
TED E. HARTUNG,
Counsel for Appellee.

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2. That the order allowing appeal was served upon Appellee on or about the date it bears, to-wit: December 3, 1945.

3. That at the time the petition for allowance of appeal was presented and the order allowing appeal entered there was presented to the Judge of the United States Circuit Court of Appeals, Eighth Circuit, assignment of error No. 1, challenging the decision of both the United States District Court of Iowa, Southern District, Central Division, and the United States Circuit Court of Appeals, Eighth Circuit, holding that Chapter 267, Section 1, Law of the 50th General Assembly of Iowa, violated the constitution of the United States.

4. That after order allowing appeal was entered there was filed in the United States Circuit Court of Appeals, Eighth Circuit, an additional assignment of error designated as assignment of error No. 2, asking the review of the United States Supreme Court on the matter of the sufficiency of the evidence to show that Appellee was engaged in commerce and therefore within the coverage of the Fair Labor Standards Act.

5. The Court is without jurisdiction to entertain assignment of Error No. 2, for the following reasons:

(a) It was not presented to and considered by the Eighth Circuit Court of Appeals at the time order allowing appeal was entered.

(b) Assignment of Error No. 2 presents only alleged error based upon a finding of fact by both the United States District Court of Iowa and the Eighth Circuit Court of Appeals.

(c) There is a misjoinder in errors assigned, one at law under assignment of Error No. 1 and one of fact under assignment of Error No. 2.

(d) The Supreme Court of the United States is without jurisdiction to review, consider or determine assignment of Error No. 2, for the reason that the only possible right to prosecute an appeal is derived from Section 240(b) of the Judicial Code, 28 U. S. C. A., Section 347(b) which limits the Supreme Court upon appeal to the consideration of questions of law, only, and assignment of Error No. 2 would require the review of questions of fact, as distinguished from the question of law.

6. Chapter 267, Section 1, law of the 50th General Assembly of Iowa, urged as a defense by Appellant in both the United States District Court and the Eighth Circuit Court of Appeals, was between the time of the decision in the United States District Court of Iowa and its affirmance by the Eighth Circuit Court of Appeals on October 29, 1945, repealed by the 51st General Assembly of the State of Iowa, by the enactment into law of Chapter 222, laws of the 51st General Assembly of the State of Iowa and which Act became effective by operation of law on July 4, 1945. That Chapter 222, laws of the 51st General Assembly of the State of Iowa is as follows:

"Chapter 222
Limitation of Actions
S. F. 94

An Act to repeal chapter 267, laws of the Fiftieth General Assembly, fixing the period of limitations within which actions may be begun with respect to certain claims arising out of Federal Statutes, when no period of limitation is prescribed therein, and providing for a period of limitation for claims for wages.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. That Chapter 267, laws of the Fiftieth General Assembly be and the same is hereby repealed.

Sec. 2. Subsection five (5) of Section eleven thousand seven (11007) is amended by striking the period (.) following the word "years" in line seven (7) and adding the following: "except as provided by subsection nine (9)."

Sec. 3. Section eleven thousand seven (11007) is further amended by adding a new subsection as follows: "9. Those founded on claims for wages or for a liability or penalty for failure to pay wages, within two years. Any present existing causes of action must be commenced in any court of competent jurisdiction within six (6) months after the effective date * of this act."

Approved March 29, 1945.

That in support of the legislative fact above set forth, there is hereto attached marked Exhibit "A," and by said reference made a part hereof, the affidavit of Walter F. Maley, one of Counsel for Appellee herein.

7. That by reason of repeal of the law upon which Appellant relies, both in the United States District Court and in the Circuit Court of Appeals, Eighth Circuit, the present appeal, including both assignments of error constitute and present a moot question only, neither requiring nor justifying review, consideration or determination by the Supreme Court of the United States.

(a) Section 1, Chapter 267, Laws of the 50th General Assembly of Iowa, relates solely to matters of procedure, in which a litigant has no vested right. The repeal of that statute upon which Appellant relies makes it unnecessary to consider the moot question thus presented upon appellant's proposed appeal, as to whether such statute was enforceable in the Federal Court.

---

* Effective July 4, 1945.

(b) Inasmuch as the statute upon which Appellant relies as a defense no longer has any legal existence, if the Supreme Court of the United States should entertain this appeal, it would be passing upon a mere academic question affecting no one's substantial rights, inasmuch as the repeal of the statute effectually deprives the Appellant of any defense based upon such statute.

(c) If this appeal were to be prosecuted and determined by the Supreme Court of the United States and this cause reversed, it would avail the Appellant nothing as the statute upon which he relies as a defense would not be available to him in the lower Court in the event of a re-trial of the case in the United States District Court, as it has been repealed and the Supreme Court of the United States will not entertain, consider or pass upon moot questions.

8. There is no jurisdiction vested in the Supreme Court of the United States to entertain an appeal from the decision of the Circuit Court of Appeals in this cause for the reason that the only possible statute upon which Appellant could rely is Section 240(b) of the Judicial Code, 28 U. S. C. A., Section 347(b) which authorizes an appeal only where the validity of a statute of a State is drawn in question, and the decision is against its validity, as neither the United States District Court nor the Circuit Court of Appeals for the Eighth Circuit passed upon or determined the validity of Section 1, Chapter 267, Laws of the 50th General Assembly of Iowa, upon which Appellant relies as a defense, but the only holding of the United States District Court and of this Court was to the effect that such statute was not enforceable in the Federal Courts. The United States District Court said in part, "It is not a question of constitutionality, but it is an attempt on the part of the legislature of the State of Iowa to enter a field

of legislation exclusively within the authority of the Congress of the United States," and the Circuit Court of Appeals said, "We conclude that this special statute of Limitations cannot be enforceable in Federal Court. The judgment appealed from is therefore affirmed."

Hence the validity of the statute has never been "drawn in question," in this cause, within the meaning, intention and contemplation of the provisions of Section 240(b) of the Judicial Code and there is no right to prosecute an appeal to the Supreme Court of the United States in this cause.

9. There has been no decision by the United States District Court, for the Southern District of Iowa, or the United States Circuit Court of Appeals for the Eighth Circuit, holding unconstitutional or invalid the provisions of Chapter 267, Laws of the 50th General Assembly of Iowa, upon which Appellant attempted to rely as a defense. Therefore, the decision of the Circuit Court of Appeals for the Eighth Circuit is final and binding and conclusive in this cause and no appeal may be prosecuted from its decision to the Supreme Court of the United States.

10. In view of the fact that Section 240(b) of the Judicial Code is not applicable or available to the Appellant, there is no avenue open to the Appellant to take an appeal in this cause to the Supreme Court of the United States from the decision of the Circuit Court of Appeals for the Eighth Circuit. The Petition for Rehearing having been denied, the Appellant has reached the end of the road in this litigation.

11. Neither the United States District Court nor the Circuit Court of Appeals has said that Chapter 267, Laws of the 50th General Assembly of Iowa, may not be successfully pleaded as a defense in the prosecution of a cause

of action pending in the State Courts of Iowa. Neither have said Courts said that the statute in question impinges upon, is contrary to, or in violation of the Constitution of the United States, or any of the amendments thereto, so as to deprive a litigant of the benefit of the provisions of such statute in litigation in the State Courts of Iowa. Therefore, the statute has not been held to be invalid within the intent and meaning of Section 240(b) of the Judicial Code and no appeal from the decision of the Circuit Court of Appeals may be taken to the United States Supreme Court in this cause.

Respectfully submitted,

GEORGE B. PORTER,
WALTER F. MALEY,
TED E. HARTUNG,
Counsel for Appellee.

EXHIBIT A

AFFIDAVIT OF WALTER F. MALEY, ATTORNEY AT LAW

STATE OF IOWA,
Polk County, *ss:*

I, Walter F. Maley, being first duly sworn, on oath depose and say that I am an attorney at law, in Des Moines, Iowa, and am now and have been actively engaged in the practice of my profession in the courts of Iowa for over twenty-five years last past. That I am familiar with the history of Chapter 267, Laws of the 50th General Assembly of the State of Iowa and that said Chapter 267 was repealed by Chapter 222, Acts of the 51st General Assembly of the State of Iowa and that said repealing statute became in full force and effect on the 4th day of July, A. D., 1945.

I further state that said Chapter 222 as set forth in the body of the within Motion is true and correct.

WALTER F. MALEY.

Subscribed in my presence and sworn to before me on this 17th day of December, A. D. 1945.

RUTH V. BAUSERMAN,
Notary Public in and for Polk County, Iowa.

[SEAL.]

FILE COPY

FILED
MAR 7 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

REPUBLIC PICTURES CORPORATION, *Appellant,*

vs.

FRANCIS KAPPLER, *Appellee.*

No. 723.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
8th CIRCUIT.

PETITION FOR REHEARING BY APPELLANT

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vs.

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APPEAL FROM THE CIRCUIT COURT OF APPEALS
8th CIRCUIT.

PETITION FOR REHEARING BY APPELLANT

REVIEW OF RECORD.

Appellant duly took an appeal to the Supreme Court of the United States from a judgment of the Circuit Court of Appeals, 8th Circuit, which held Chapter 267 Laws of the Fiftieth General Assembly of Iowa to be void on the ground it violated the Federal Constitution. The Iowa statute in question provided as follows:

> "Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943."

After the appeal was taken, appellee filed under Rule 7(3) of this court, what was entitled a "Motion to Dismiss or Affirm". But the Motion to Dismiss or Affirm filed by the appellee was addressed only to the jurisdiction of the court and did not go to the merits of the case. Consequently, the appellant, in filing Resistance to Appellee's Motion, confined itself to the jurisdictional matters raised by appellee in his Motion and answered them seriatim in its Resistance to the Motion. Had the Motion of Appellee gone to the merits, appellant would have made resistance to the grounds urged. But, in affirming, this Court has passed upon the merits of the case without affording appellant its day in court. The order of this court entered on February 4th affirming the Circuit Court of Appeals, 8th Circuit, was as follows:

> "*Per curiam:* The motion to affirm is granted and the judgment is affirmed. *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U. S. 230, 233, 234; *Pufahl v. Estate of Parks*, 299 U. S. 217, 227; *Miles v. Illinois Central Railroad Co.*, 315 U. S. 698, 704."

The foregoing order is obviously based upon the merits of the case and is far broader than the merely jurisdictional grounds stated in the motion of appellee. Appellant has therefore been denied an opportunity to say why it believes this appeal should be heard.

PROPOSITIONS AND AUTHORITIES.

UNDER THE RULES OF THIS COURT, THE APPEAL SHOULD NOT HAVE BEEN DISMISSED ON ITS MERITS.

Authority.

Rule 7(4) of the Revised Rules of Supreme Court of the U. S.

THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE NOT SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT. THEREFORE THIS CAUSE SHOULD BE HEARD ON ITS MERITS.

Authorities.

28 *USCA* Sec. 725.

Canadian Northern Ry. Co. v. Eggen, 1919, 252 U. S. 553.

Campbell v. Haverhill, 1894, 155 U. S. 610.

Chicago & N. W. Ry. Co. v. Ziebarth, 1917, (8th Cir.) 245 Fed. 334.

M'Elmoyle v. Cohen, 1839, 13 Peters 312.

12 *Am. Jur.* p. 121, Sec. 464.

Bauserman v. Blunt, 1893, 147 U. S. 647.

Chattanooga Foundry v. Atlanta, 1906, 203 U. S. 390.

3 *Cyc. of Fed. Proc.* (2d Ed.) Sec. 619, page 115.

Momand v. Twentieth-Century Fox Film Corp., 1941, 37 Fed. Supp. 649.

Following cases distinguished:

McKnett v. St. Louis & San Francisco Railway Co., 292 U. S. 230, 233, 234.

Pufahl v. Estate of Parks, 299 U. S. 217, 227.

Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704.

Argument.

This case comes up on appeal (28 U. S. C. A. Sec. 347). But in this court's order of affirmance it has been treated as though here on petition for writ of certiorari. Appellee filed a motion challenging jurisdiction and the court affirmed the case *on its merits*. Appellant has not been heard on the question of whether the appeal should be considered on its merits, notwithstanding a state statute has been held void as violative of the federal constitution. Rule 7(4) of the Revised Rules of Procedure provides the grounds on which a motion to affirm will be received. Following is the pertinent portion of the rule:

> "The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Under the foregoing rule it is clear that a motion to affirm will be received only on the following two grounds: (1) That it is manifest the appeal was taken for delay only, or (2) that it is manifest the questions on which the decision depends are so unsubstantial as not to need further argument.

Please note that appellee's motion was not addressed to either of these two grounds. A careful examination of the Motion reveals that neither of these grounds nor anything touching them was so much as mentioned. Consequently, in filing its resistance to appellee's motion, appellant confined itself to the jurisdictional matters raised by the motion.

Turning to Rule 7(4) again, no one will seriously contend that this appeal has been taken for delay only. The Circuit Court of Appeals was divided on the important constitutional issue involved in the appeal. An array of respectable authority supports the position of appellant and

the dissenting opinion of Sanborn, J. in the Circuit Court.

Referring to the second ground upon which a motion to affirm will be received under the rules, is it manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument?

Involved herein is a question of the constitutionality of a regularly enacted statute of limitations passed by the legislature of a sovereign state. Is a statute, duly enacted by the highest legislative body of a state to be declared violative of the federal constitution by the highest court of the land without affording the party adversely affected an opportunity to present his reasons why the appeal should be heard on its merits?

Will such a statute be held unconstitutional by the highest court of the land in a summary fashion without an adverse contest between the parties and a full opportunity for presentation of the reasons why the appeal should be heard?

Presumptively, being a regularly enacted legislative Act, the statute is constitutional. (*South Carolina State Highway Dept. v. Barnwell Bros.*, 1938, 303 U. S. 177). Constitutionality of a state statute will not be considered in a friendly suit; it must be a bona fide adversary proceeding. (*Chicago, etc., R. Co. v. Wellman*, 1892, 143 U. S. 339). But this appellant has not had an opportunity to present its view of the merits at all. To rule a duly enacted statute of a state unconstitutional upon a motion addressed to jurisdiction only, denies appellant his opportunity to say why the appeal should be heard. Appellant has been denied its day in court. Surely, every litigant should have an opportunity to say why his appeal should be heard, especially where the decision below has denied a right granted by a state statute.

The Iowa statute is unusual in its form, but it embraces a subject matter admittedly within the jurisdiction of the

state legislature. If the Iowa statute is held unconstitutional it must be because of the *form* of the statute. No rule is more firmly entrenched in the federal law than that the Rules of Decision Act applies to state statutes of limitation in the case of enforcement of federally created rights in both the federal and state courts where Congress has failed to provide a limitation. This rule is so deeply rooted, that it applies to federally created rights, enforceable only in the federal courts. The following authorities are in point on the foregoing propositions:

In *Bauserman v. Blunt*, 1893, 147 U. S. 647, this court says:

> "No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court."

In 3 *Cyc. of Fed. Proc.* (2d Ed.) Sec. 619, page 115, it is said:

> "Moreover, a state is in general free to place of limitation upon the time in which a remedy granted by Federal statute may be asserted in a state."

Campbell v. Haverhill, 1894, 155 U. S. 610, is a leading case upon this subject in which it is said:

> "The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several States."

Again in *Campbell v. Haverhill*, it is said, (l. c. page 620):

> "Even upon the theory of the plaintiffs in this case, the statutes of limitations of the States would have been

a good defense so long as the jurisdiction was concurrent, but would cease to be so as soon as the jurisdiction of the Federal courts became exclusive. The bare statement of this proposition is sufficient to show its untenableness."

In *Chattanooga Foundry v. Atlanta*, 1906, 203 U. S. 390, it is said:

"Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to the local law by the silence of the states of the United States."

In *Momand v. Twentieth-Century Fox Film Corp.*, 1941, 37 Fed. Supp. 649, the court said:

"It was held in the numerous cases cited, *supra*, that the state was free to place a limitation upon the time in which a remedy granted by Federal statute could be asserted in a state, and that such limitations would not impair the right created by congressional statutes."

Reduced to its most fundamental form the question is therefore, is the Iowa statute of limitations invalid because restricted in terms to cases arising under federal statutes? In other words, is the statute invalid because it does not also embrace within its terms other types of cases arising under local law? Otherwise expressed, does the state lack power to legislate directly, but possess power to legislate indirectly upon a subject which Congress has expressly delegated to local determination without reservation?

The summary judgment of this court disposing of the case on its merits overlooks or rejects the fundamental nature of statutes of limitation. It has always been the rule that statutes of limitation cannot be held void because discriminatory. Discrimination is of their essence. The difficulty arises only when the period of limitation is so short that a litigant is denied free access to the courts for a reasonable period of time within which to bring his action.

In *Canadian Northern Ry. Co. v. Eggen*, 1919, 252 U. S. 553, the question was whether the state of Minnesota could provide one statute of limitations for residents of the state, and a different limitation for non-residents. The Circuit Court of Appeals (8th Cir.) held it could not. The Supreme Court of the United States reversed the Circuit Court of Appeals. The following quotations from the opinion by the unanimous court demonstrates the rationale of the case:

> "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection."

Again in *Canadian Northern Ry. Co. v. Eggen*, the court says:

> "The discrimination of which he complains could arise only from his own neglect."

In *M'Elmoyle v. Cohen*, 1839, 13 Peters 312, this court considered whether a state statute specifically limiting the time for commencement of actions upon a foreign judgment to a time shorter than that prevailing for the institution of actions upon domestic judgments, denied the full faith and credit to which foreign judgments were entitled under Article IV of the Constitution. Therein the court held that the statute in question affected the remedy only and that discriminatory legislation providing different limitations did not affect the case in a constitutional sense. In its opinion, the court says:

> "Such being the faith, credit, and effect, to be given to a judgment of one state in another, by the Constitution and the Act of Congress, the point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that

settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy; and, consequently, that the *lex fori* must prevail. *Higgins v. Scott*, 2 Barn. & Adol. 413; 4 Cowen R. 528, note 10; *Id.* 530; *Van Ramsdyk v. Kane*, 1 Gillis R. 371; *LeRoy v. Crowninshield*, 2 Mason R. 351; *British Linen Co. v. Drummond*, 10 Barn. & Cress. 903; *De LaVega v. Feanna*, 1 Barn. & Adol. 284; *De Coche v. Savalier*, 3 Johns. Ch. R. 190; *Lincoln v. Battalle*, 6 Wend. R. 475; *Guilick v. Lodes*, Green's New Jersey Rep. 68; 3 Burge's Com. on Col. and For. Laws, 883. The statute of Georgia is 'that actions of debt on judgments obtained in courts other than the courts of this state, must be brought within five years after the judgment obtained.' It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right in virtue of their sovereignty? or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not, then, limit the time for remedies upon the judgments of other states, and alter the common law by statute, fixing a less or later time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing, in regard to a state's right to legislate in this particu-

> lar, then the judgment creditors of the state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining the remedy upon the judgment of another state, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years. In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. * * *"

In 12 *Am. Jur.*, page 121, Section 464, the true rule is stated as follows (apparently taken from the *Eggen* case):

> "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection."

Arbitrary classification of causes of action for limitation purposes is the rule, not the exception. There is no rule that the classification must fit into a symetrical pattern. Nor has any case heretofore held that the legislature may not legislate specifically for the purpose of fixing statutes of limitation on federally created rights *enforceable in the state courts.* The Iowa statute does not attempt to override the supremacy of federal law. It merely fills the gap which Congress by its silence, has left to the states without reservation. If Congress is not satisfied with the limitation provided by the legislatures of the respective states, the remedy should lie with Congress—not with the courts.

There is no invasion of the supreme authority of the federal government because, (1) Congress has abandoned its authority voluntarily to the states by its silence, well-knowing that the matter was being left to local law; and (2) no one is in a position to complain as long as he is permitted to bring his action within a reasonable time. If Congress is not satisfied, it may prescribe its own period of limitations.

The Iowa statute was not designed to provide a statute of limitations for federally created rights enforceable only in the federal courts. The Iowa statute would operate upon such rights enforceable only in the federal courts, not *ex propre vigore*, but by virtue of the Rules of Decision Act (28 U. S. C. A., Section 725; *Campbell v. Haverhill*, 1894, 155 U. S. 610; *Bauserman v. Blunt*, 1893, 147 U. S. 647). If there is to be a reservation engrafted upon the Rules of Decision Act, such reservation should be supplied by Congress, and not by a legislative fiat of the court.

Cases Distinguished.

In its order of February 4th, this court cites three cases in support of its decision. They are:

McKnett v. St. Louis & San Francisco Railway Co., 292 U. S. 230, 233, 234.

Miles v. Illinois Central Railroad Co., 315 U. S. 698, 704.

Pufahl v. Estate of Parks, 299 U. S. 217, 227.

The *McKnett* case, *supra*, involved an Alabama statute which completely closed its courts to enforcement of a federally created right arising in Tennessee. The distinction between this situation and the case at bar is so apparent, it seems it should demand little discussion. The complete closing of the courts of a state to a litigant attempting to enforce a federally created right is a far cry

from a statute of limitations allowing free access to the courts of a state for a reasonable length of time. Especially is this true where the subject matter is admittedly within the jurisdiction of the state legislature and the attack is only upon the form of the statute.

The *Miles* case, *supra*, involved an injunction by a Tennessee court which enjoined a litigant from bringing suit in Missouri on a federally created right. The *Miles* case is analogous to the *McKnett* case but bears little, if any relation to the case at bar for the same reasons. It involved the complete closing of a court to enforcement of a federally created right.

In the *Pufahl* case, *supra*, one Elvira Parks, died owning stock in a national bank. Some two years after administration was opened on the estate the Comptroller of Currency declared the bank insolvent and appointed the petitioner receiver thereof. The Comptroller assessed all stockholders, including the executors of the will of Elvira Parks, 100% of the par value of all stock held. The Illinois Probate Court disallowed the claim because a state statute limited the period for filing claims to one year. The federal law provided for the assessment of stockholders of National Banking Associations and the petitioner contended that the federal law authorized the allowance of the claim regardless of the Illinois statute. In the *Pufahl* case the claim of the receiver *was not upheld*, but denied. In the case at bar the Circuit Court of Appeals quoted the following provision from the opinion in the *Pufahl* case:

> "This is not to say that a state may deny all remedy for the substantive right arising out of the Federal statute * * * it is merely to say that *if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action." (Italics supplied by the C. C. A.)

It will be observed that the foregoing portion of the opinion of the *Pufahl* case was directed to the question of whether a national bank receiver must assert his claim in the same forum in which other claims against a decedent's estate were required to be made under local law, and the quotation did not refer to the applicability of the state statute of limitations. The portion of the opinion in the *Pufahl* case which the Circuit Court of Appeals chose to italicize must be read in the light of the language immediately preceding it, to-wit: "This is not to say that a state may deny all remedy for the substantive right arising out of the Federal statute". The italicized language was directed to a situation in which a state might discriminatorily deny jurisdiction to its courts for the enforcement of federally created rights. The opinion was not intended to, and did not, involve the question of how long state courts must be open for the enforcement of federally created rights. The actual decision in the *Pufahl* case would support the position of the appellant in the case at bar, insofar as the Supremacy clause of the Constitution is concerned. The case is no authority for the contention that a state cannot in the exercise of control over its courts, enact a statute of limitations specifically applicable to federally created causes of action which are enforceable in its own courts. Congress is the body (28 U. S. C. A., Sec. 765) which has declared that such local statute of limitations shall be adopted and applied in the federal courts, (*Bauserman v. Blunt*, 1993, 147 U. S. 647). It is not for the courts to engraft a limitation upon the Rules of Decision Act (*Guaranty Trust Co. v. York*, 1945, 326 U. S. 99).

CONCLUSION.

The matter presented by this appeal is of great importance. Within the last several years at least fourteen other states have passed statutes of limitation specifically directed to federally created rights. They are:

Alabama, Act 392, Acts 1943,
Colorado, S. B. 165, Laws 1945,
Florida, Ch. 21892, Laws 1943,
Georgia, Act 439, Acts 1943,
Maryland, Ch. 518, Laws 1945,
Minnesota, Ch. 513, Laws 1945,
North Carolina, S. B. 316, Laws 1945,
North Dakota, H. B. 114, Laws 1945,
Ohio, S. B. 256, Laws 1943,
Oregon, Ch. 265, Laws 1943,
South Carolina, Act 36, Acts 1945,
South Dakota, Ch. 145, Laws 1945,
Tennessee, Ch. 130, Acts 1945, and
Wisconsin, Sec. 330.215, Statutes 1945.

The memorandum decision of this court without opinion is no guide for consideration of these statutes, and allows the applicable law to remain in a state of great confusion. Appellant respectfully submits that a great injustice has been done in affirming this *appeal* on the merits without allowing it an opportunity to present its reasons why the matter should be heard. Even if the motion filed by appellee had been directed to the merits of the case, such motion should have been overruled under the Rules of this court, because there is a substantial question involved of great importance to many states. The matter should be authoritatively settled only after a full presentation of the many arguments in favor of the validity of the statute in question. The reasons hereinbefore set forth are not as detailed or comprehensive as they might be upon the final presentation of this case, but appellant respectfully submits they are sufficient to amply demonstrate that the ques-

tions on which the decision of the cause depends are not so unsubstantial as not to need further argument (Rule 7(4) of the Revised Rules).

PRAYER.

Wherefore, appellant respectfully prays that a rehearing be granted, that the order of this court on February 4, 1946 affirming the case be set aside, that the motion of the appellee be overruled, and the appeal be permitted to proceed to final determination upon a full consideration of its merits, in accordance with the Rules of this court.

Respectfully submitted,

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E. D. Perry,
Robt. Bannister,
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1012-1020 Bankers Trust Building,
Des Moines 9, Iowa,
Attorneys for Appellant.

DECISIONS PER CURIAM, ETC., FROM JANUARY 29, 1946, THROUGH APRIL 22, 1946.*

No. 723. REPUBLIC PICTURES CORP. *v.* KAPPLER. Appeal from the Circuit Court of Appeals for the Eighth Circuit. February 4, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *McKnett* v. *St. Louis & San Francisco R. Co.*, 292 U. S. 230, 233, 234; *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 227; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 704. *A. A. McLaughlin* for appellant. *George B. Porter* for appellee. Reported below: 151 F. 2d 543.